ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Ms. Rebecca Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

August 3, 2004

Re: WCB Docket Nos. 96-98, 98-147, 01-338

Dear Ms. Dortch:

On July 28, 2004, Verizon filed an *ex parte* letter in the above-referenced dockets asking the Commission to suspend the effectiveness of all existing interconnection agreements and hold that Verizon and other incumbents can immediately and unilaterally cease providing any network elements that it considers no longer required by law. ALTS responds to this Verizon submission to clarify that Verizon remains obligated, notwithstanding its new interpretation of what constitutes "law," to continue providing network elements at cost-based rates while it negotiates new interconnection agreements with its competitive carrier customers. In addition, because the FCC already rejected this exact Verizon argument in the *Triennial Review Order*, and because that decision was not disturbed by the D.C. Circuit, Verizon is essentially filing an untimely reconsideration petition that the Commission should reject.

Verizon argues that "many" interconnection agreements include "flow through" provisions that allow Verizon, "subject only to a notice requirement set forth in the agreement," to "stop provisioning UNEs consistent with a judicial decision."[1] Verizon concludes that there is "no legitimate argument" that the change of law process, outlined in such interconnection agreements, "is required in order for an incumbent to align its commercial practices with the requirements of federal law."[2] Verizon does not provide any examples of such agreements that it alleges would permit it to take unilateral action of this kind. Moreover, Verizon claims that, even where an interconnection agreement contains no such "flow through" provisions, Verizon is still entitled to unilaterally discontinue compliance with the interconnection agreement, because the D.C. Circuit decision in *USTA II* "did not trigger any such provision."[3]

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[1] Letter dated July 28, 2004, from Dee May, Vice President, Verizon, to Marlene Dortch, Secretary FCC, WCB Docket Nos.01-338, 96-98, 98-147, at 4.
[2] *Id.*
[3] *Id.* at 5.

Verizon's current view of the change of law provisions marks a complete reversal of the position it takes on such provisions when it believes it is in its interest. For example, Verizon's claim directly contradicts the position taken by its outside counsel in the course of the *Triennial Review* proceeding:

> Many interconnection agreements provide generally for amendment pursuant to "legally binding" intervening law or a "final and nonappealable" order. Such provisions would be triggered, at the very latest, when the decision of the D.C. Circuit vacating all of the Commission's prior unbundled network element rules becomes final and nonappealable . . . . The D.C. Circuit vacatur thus creates the change of law.[4]

Not surprisingly, Verizon also takes the opposite position regarding those issues on which competitive carriers prevailed in the Triennial Review proceeding. In the Triennial Review proceeding, the Commission reversed Verizon's so-called "no facilities" policy, requiring Verizon and other incumbents to provision high-capacity loop facilities notwithstanding their position that certain electronic components of such loops were not available.[5] As soon as competitive carriers attempted to compel Verizon to comply with these obligations, Verizon immediately claimed that the Triennial Review decision (on this point only) was a change of law and required interconnection agreement negotiations to incorporate it. For example, before the Maine PUC, Verizon argued that the Triennial Review decision was "a change of law, that the FCC established new rules, and that CLECs must modify their interconnection agreements before Verizon will perform routine network modifications."[6]

More importantly, the FCC has already considered – and rejected – the exact interpretation of Verizon's interconnection agreement obligations that Verizon now reiterates here. Specifically, in the Triennial Review proceeding, the Commission "decline[d] the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions."[7] The Commission was fully aware, in reaching this conclusion, that "the practical effect of this negotiation of new terms may be that parties are provided a transition period."[8] Nevertheless, the Commission declined the BOC request for "the extraordinary step of the Commission interfering with the contract process."[9] In addition, the FCC has also expressly rejected Verizon's core claim of

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[4] Letter from Michael Kellogg, Kellogg, Huber, *et al.*, to Rebecca Dortch, Secretary, FCC, WCB Docket Nos. 96-98, 98-147, 01-338 (filed January 21, 2003) at 2. Verizon's same outside counsel later repeated this sentiment at oral argument before the D.C. Circuit. In response to questioning from the bench regarding the status of UNEs should the D.C. Circuit vacate any FCC UNE rules, Kellogg responded that, notwithstanding such a vacatur, such UNEs would continue for some time under existing interconnection contracts.

[5] *See, e.g.*, Triennial Review Order at paras. 632-641.

[6] Examiner's Report, Petition for Consolidated Arbitration, Maine PUC, Docket No. 2004-135, released May 6, 2004.

[7] Triennial Review Order at para. 701.

[8] *Id.*

[9] *Id.*

judicial support for its new view.[10] Specifically, the FCC has held that the Supreme Court's so-called *Mobile-Sierra* doctrine is not applicable to interconnection agreements, contrary to Verizon's argument.[11]

Verizon claims in its *ex parte* submissions that "[f]orcing the parties to go through a "change of law" renegotiation process would merely be a way of perpetuating the unlawful unbundling requirements for an additional period of time."[12] In its haste to eliminate competitors, Verizon even admits that, absent FCC rules requiring it to provide UNEs, it would never have agreed to do so: "Absent the compulsion of the FCC's now-vacated regulations, ILECs would not of their own volition have entered into interconnection agreements on the specific unbundling terms and conditions required by the Commision."[13] Verzion even goes so far as to claim that "interconnection agreements are merely the tools through which the Commission put into operation its unlawful unbundling rules."[14] But Verizon must descend into self-contradiction to support its arguments. Verizon concedes that "interconnection agreements are generally binding," but argues that because they are "to a large extent a byproduct of federal law," they "must not be interpreted to continue to impose obligations that are contract to such law and thus undermine Congress' goal in enacting section 251."[15] Although it is true that negotiating new interconnection agreements takes time, it is equally true, as the FCC concluded, that "the lag involved in the negotiating and implementing new contract language" in no way "warrants the extraordinary step" of regulatory interference with such contracts.[16]

Taken at face value, Verizon's view of its interconnection agreement obligations – that judicial decisions remanding FCC decisions for further proceedings are not changes in law – calls for a pure interpretation of what "law" is. Verizon rejects the notion that what the FCC says is "law," and further rejects the notion that a court does anything more than simply "announce the true meaning of the statute as it has always existed."[17] In short, Verizon claims that the only change in law that would entitle a competitive carrier to negotiate changes to an interconnection agreement are actual changes in the law – that is, the actual statute itself. To follow Verizon's logic, because no change of law (in Verizon's view, a change in Title 47 of the U.S. Code) has actually occurred, Verizon remains obligated to provide, pursuant to section 251 of the Act, those unbundled network elements that it is currently providing. If the Commissions accepts Verizon's argument, unless and until Congress enacts, and the President signs into law, a complete revocation of the unbundling obligations of sections 251, 252 and 271 of the

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[10] *See Verizon July 28 ex parte* at 7 n.3 ("The Commission also has authority under the *Mobile-Sierra* doctrine to override the provisions of interconnection agreements that would impede the implementation of the mandate in *USTA II*.)".

[11] *See IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd 11474 at para. 16 n.50 (2001) ("the *Mobile-Sierra* doctrine does not apply to interconnection agreements under sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements.").

[12] Verizon July 28 *ex parte* at 6.

[13] *Id.*

[14] *Id.*at 7.

[15] *Id.* at n.2.

[16] Triennial Review Order at para. 701.

[17] *Id.*

Communications Act, as amended, Verizon remains obligated to provide, *inter alia*, "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[18] In other words, Verizon's claim that judicial review of the FCC's interpretation of the statutory parameters of the incumbents' unbundling obligations is meaningless actually renders Verizon obligated to continue providing *all* UNEs that it currently provides under existing interconnection agreements.

In short, the relief Verizon asks of the Commission in its *ex parte* letter is more appropriately cast as a petition for reconsideration of the Triennial Review Order, and such reconsideration is not timely filed. Verizon asks: "Specifically, the Commission must make clear that all reductions in unbundling obligation mandated by *USTA II* promptly flow through all interconnection agreements."[19] Because the Commission unanimously rejected that request in the Triennial Review Order, and because the D.C. Circuit did not disturb that aspect of the decision, the Commission's interpretation of sections 251 and 252 of the Act is the "law," no matter how loosely Verizon interprets the word. In addition, Verizon remains obligated to provide cost-based access to network elements by the terms of the Bell Atlantic/GTE merger[20], by the obligations of the competitive checklist of section 271, and by the overarching unbundling obligations inherent in sections 251 and 252 of the Act. As such, the Commission simply cannot grant Verizon unilateral authority to declare itself free of any and all bodies of law.

Respectfully submitted,

/s/ Jason Oxman

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ALTS

cc:
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[18] 47 U.S.C. sec. 251(c)(3).
[19] *Id.* at 7.
[20] *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent To Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, at para 316 (June 16, 2000).